



# The Fertilizer Institute

Nourish, Replenish, Grow

William C. Herz  
Vice President,  
Scientific Programs

November 10, 2011

## **VIA Electronic Submission**

Lisa P. Jackson, Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

***Re:       Petition to Add Phosphate Mines to  
          Industries Subject to TRI Reporting***

Dear Administrator Jackson:

The Fertilizer Institute (TFI), on behalf of its member companies, submits the following in response to a U.S. Environmental Protection Agency (EPA) request for comment through a discussion forum posted online (TRI Exchange).<sup>1</sup> EPA solicits comment on expansion of the list of industries that would be subject to toxic release inventory (TRI) reporting under Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA). EPA is considering adding phosphate mining, among other industries, to the list of industries that would be subject to TRI reporting. Because the addition of phosphate mining to the TRI program will not further the purposes of EPCRA Section 313, TFI recommends that EPA eliminate phosphate mining from the list of industries under consideration for inclusion in the TRI program in any future rulemakings.

## **STATEMENT OF INTEREST**

TFI represents the nation's fertilizer industry including producers, importers, retailers, wholesalers and companies that provide services to the fertilizer industry. Its membership is served by a full-time Washington, D.C., staff in various legislative, educational, and technical areas as well as with information and public relations programs. Many TFI members are engaged in phosphate mining and, as such, TFI and its members have a substantial interest in any contemplated expansion of the TRI program to include this industry.

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<sup>1</sup> The discussion forum can be accessed at:  
<http://www.regulations.gov/exchange/topic/trisectorsrule/agencyintro/tri-exchange>.

## **COMMENTS**

On November 3, 2009, the Greater Yellowstone Coalition (Coalition) petitioned the Agency under Section 553(e) of the Administrative Procedure Act to promulgate a rule adding phosphate mining to the list of industries subject to TRI reporting. This is not the first time the Coalition has requested TRI reporting for the mining industry. TFI responded in April 2006 and a copy of that correspondence is attached. The law has not changed, and the Coalition has not provided any reason or new evidence to suggest that the EPA re-visit its decision not to pursue TRI reporting for the phosphate mining industry. For the following three reasons and as explained in more detail in the attached letter, we believe that EPA should reject the Coalition's petition.

- First, selenium is a naturally occurring element that does not fall within the scope of TRI reporting because it is not manufactured, processed or otherwise used;<sup>2</sup>
- Second, even assuming that the selenium minerals in the phosphate rock are somehow deemed subject to TRI reporting, amounts contained in waste rock meet the *de minimis* exemption from reporting;<sup>3</sup> and
- Third, TRI reporting would not provide the public with any new information where, as here, the Idaho Mining Association member phosphate companies signed an agreement with the EPA, U.S. Forest Service, U.S. Bureau of Land Management, Idaho Department of Environmental Quality and the U.S. Fish and Wildlife Service that have led to publicly available and site-specific studies at the mine sites to determine the extent of the naturally-occurring selenium, the risks associated with the amounts of selenium, options for addressing any risks, and implementation of remedies.

These three reasons lead to the conclusion that listing phosphate mining as an industry subject to TRI reporting would not result in reporting of information beyond what already exists. EPCRA allows EPA to add Standard Industrial Classification Codes “but only to the extent necessary to provide that each Standard Industrial Code to which this section applies is relevant to the purposes of this section.” 42 U.S.C. 11023(b)(1)(B). Since listing phosphate mining would not result in any new reporting or otherwise further the purposes of the TRI program, EPA lacks authority to list it. Accordingly, EPA should eliminate phosphate mining from the list of industries it is considering to add to the TRI program since it would not satisfy the listing criteria.

TRI reporting would do nothing except add unnecessary and challenging administrative burdens that would waste resources of companies throughout the industry and of the EPA. Such administrative

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<sup>2</sup> 42 U.S.C. § 11023(a). The threshold for TRI listed chemicals that are “manufactured” and “processed” is 25,000 pounds and the threshold for TRI listed chemicals that are “otherwise used” is 10,000 pounds. 40 C.F.R. § 372.25(a) & (b). However, lower thresholds apply to certain chemicals of special concern including lead and mercury which have thresholds of 100 and 10 pounds, respectively. 40 C.F.R. § 372.28(a).

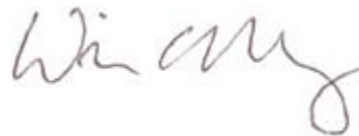
<sup>3</sup> The *de minimis* exemption provides that TRI listed chemicals present in a mixture below 1 percent (or 0.1 percent for chemicals that are carcinogens) need not be considered in calculating thresholds or release and other waste management amounts. 40 C.F.R. § 372.38(a). However, the *de minimis* exemption does not apply to chemicals of special concern (e.g., lead and mercury). *Id.*

costs will do nothing except ultimately drive up the costs of phosphate; a product that is critical to food production throughout the world. The U.S. Department of State (USDS) asserts that the demand for food is projected to increase by 50 percent over the next 20 years. Improved agricultural productivity, via the efficient use of phosphate fertilizer, is essential to meet this demand and ultimately reduce hunger. In the USDS Global Hunger and Food Security Initiative, USDS points to U.S. investments increasing access to agricultural inputs such as “seed, feed, fertilizer and irrigation systems....”<sup>4</sup> TFI agrees with the USDS’s position and encourages EPA to ensure interagency alignment on policies affecting food production, food security, and hunger.

### **CONCLUSION**

We request that the Agency incorporate by reference the 2006 TFI comments on this topic. Please call me at (202) 515-2706, or via email at [wcherz@tfi.org](mailto:wcherz@tfi.org), with any questions.

Sincerely yours,



William C. Herz  
Vice President, Scientific Programs

Attachment – Letter from William Herz, TFI. To Stephen Johnson, EPA (April 17, 2006)

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<sup>4</sup>

Available at: <http://www.state.gov/documents/organization/130164.pdf>.



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William C. Herz  
*Vice President,  
Scientific Programs*

April 17, 2006

## **VIA HAND DELIVERY**

Stephen L. Johnson, Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

**Re: Response to Petition to Add Phosphate Rock Mining to the List of Facilities  
Required to Report Releases of Chemicals Under EPCRA**

Dear Administrator Johnson:

By way of correspondence dated January 27, 2006 from Mr. Marv Hoyt of the Greater Yellowstone Coalition (the "Coalition"), the Coalition requested that the U.S. Environmental Protection Agency ("EPA" or "Agency") commence a rulemaking to add Standard Industrial Classification Code ("SIC") 1475, also known as U.S. Industry 212392 under the North American Industrial Classification System ("NAICS"), "Phosphate Rock Mining" to the list of facilities required to report releases of chemicals listed on the Toxics Release Inventory ("TRI"). The Fertilizer Institute ("TFI") provides the following response to the Coalition's rulemaking request and urges EPA to deny the request.

## **Statement of Interest**

TFI is the non-profit trade association of the fertilizer industry that is interested in all phases of the industry, from basic manufacturing to distribution and sale of fertilizers and fertilizer materials to farmers. Many TFI members engage in phosphate rock mining and related activities. As explained further below, TFI believes that adding phosphate rock mining facilities to the list of facilities required to report releases of TRI chemicals would be inconsistent with the plain language of the Emergency Planning and Community Right-To-Know Act ("EPCRA"), case law interpreting EPCRA, and EPA's TRI regulations. Therefore, TFI urges EPA to deny the Coalition's rulemaking petition.

## **The Presence of Selenium at Phosphate Mining Facilities Does Not Trigger TRI Reporting Obligations Under EPCRA**

The Coalition's request that EPA require phosphate mining facilities to report the release of TRI chemicals is founded on the presence of selenium at those facilities. *See* Greater Yellowstone Coalition, Petition to Add Phosphate Rock Mining to the List of Facilities Required to Report Releases of Chemicals Under SIC Code 1475, or NAICS 212392, at 1-2 (Jan. 27, 2006) (hereinafter "*Coalition Petition*"). According to the Coalition, "[p]hosphate mining has been responsible for the release of large quantities of selenium (Se) in Idaho," and "[c]ontinued mining in the region" allegedly creates "a human and ecological hazard in southeast Idaho." Correspondence from Mr. Marv Hoyt, Idaho Director, Greater Yellowstone Coalition, to Steve Johnson, Administrator, Environmental Protection Agency, at 1 (Jan. 27, 2006); *Coalition Petition*, at 2. We dispute the conclusions reached by the Coalition with respect to the effects of phosphate mining on the environment and believe, at present, that it is unnecessary to enter into a debate regarding the alleged human and ecological impacts of selenium in the environment. As demonstrated below, relevant legal considerations invalidate the Coalition's view that requiring phosphate mining facilities to report under the TRI program would benefit the public. Nevertheless, in the unlikely event that EPA believes it appropriate to evaluate the claims made by the Coalition, TFI would be pleased to provide relevant data and analyses and, in the context of this response, offers the following information.

The human and ecological impacts of selenium from the historic mine sites in southeast Idaho is being investigated under Administrative Orders on Consent issued under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and this information is well documented and available to the public. The active mines have implemented best management practices (BMPs) that were developed with regulatory agency involvement that are designed to minimize the selenium impacts from current mining operations. The mining companies are evaluating the effectiveness of the BMPs and the BMPs appear to be effective. There is a considerable amount of information available to the public as a result of the CERCLA investigations described above. This extensive amount of information was collected under oversight of several Federal and State agencies. All of this information is available to the public in many forms including from a web-site (<http://giscenter-ims.isu.edu/SISP>) that is maintained by Idaho State University for the Federal and State agencies and the Idaho Mining Association. The additional information collected by the TRI reports would not add a great deal of new information that is not already available to the public from the sources described above.

The Coalition acknowledges that the selenium at phosphate mining facilities exists in its natural state and is extracted from the earth, not produced by the facilities. *Coalition Petition*, at 1 ("Within these phosphate rock bearing formations (Phosphoria), [selenium] occurs naturally and is highest in the Meade Peak Member of the Phosphoria formation."). The Coalition fails to recognize, however, that the presence of selenium in its natural state at phosphate mining facilities does not trigger a threshold activity under EPCRA and, consequently, does not implicate reporting obligations under the TRI program. The Coalition also asserts that selenium is naturally converted to "selenite and selenate when exposed to weathering and oxidation as in open pit mining." *Id.* Similarly, this rationale for listing phosphate rock mining on the TRI fails because any selenium compounds present at mining facilities would be subject to the TRI's *de minimis* exemption.

**I. Chemicals Present at Mining Facilities Are Reportable Only If They Have Been “Manufactured” Within the Meaning of EPCRA**

The TRI program was created as part of the EPCRA, which was enacted by Congress in 1986 with a view to increasing public awareness of the existence of potentially hazardous chemicals in the environment. Section 313 of EPCRA requires the submittal of annual reports to EPA and state officials of “each toxic chemical listed [on the Toxics Release Inventory (“TRI”)] . . . that was manufactured, processed, or otherwise used” at certain covered facilities. 42 U.S.C. § 11023(a), (b). These reports must indicate whether the facility manufactures, processes, or otherwise uses listed chemicals, and the reports must provide an estimate of the maximum amounts of that chemical or chemical compound present at the facility, the methods of disposal or treatment of waste, and an estimate of the amount of that toxic chemical entering the environment. 42 U.S.C. § 11023(g). Facilities need not report the presence of chemicals and chemical compounds that do not undergo any of the statutory threshold activities of “manufacture,” “process,” or “otherwise use.”

Based on the statutory definitions of “manufacture” and “process,” the question of whether chemicals and chemical compounds have been subjected to a threshold activity ultimately turns on whether the chemicals have been “manufactured.” Congress defined the term “manufacture” to mean “to produce, prepare, import, or compound a toxic chemical.” 42 U.S.C. § 11023(b)(1)(C)(i). The term “process” was defined in EPCRA as “the preparation of a toxic chemical, after its manufacture, for distribution in commerce.” 42 U.S.C. § 11023(b)(1)(C)(ii) (emphasis added); *see also National Mining Association v. Browner*, 2001 U.S. Dist. LEXIS 915 (D. Colo. 2001) (“*Browner*”) (holding that chemicals and chemical compounds are not “processed” if they have not been “manufactured”). Because “processing” of a chemical only occurs, by definition, after “manufacture” of that chemical, mining facilities need not report listed chemicals unless the chemicals have been “manufactured” within the meaning of EPCRA.<sup>1</sup>

**A. Naturally Occurring Chemicals Have Not Been “Manufactured” Under the Plain Language of EPCRA**

Naturally occurring TRI chemicals present at mining facilities are not “manufactured” chemicals under the plain language of EPCRA. Section 313 of EPCRA requires the “owner or operator of a facility” to complete a “chemical release form” for “each chemical” that was “manufactured, processed, or otherwise used” in quantities exceeding the threshold amounts. “Manufacture” means “to produce, prepare, import or compound a toxic chemical.” 42 U.S.C. § 11023(b)(1)(C)(i). In this context, “manufacture” is a verb with a common dictionary definition of “to make into a product suitable for use.” Webster’s Ninth New Collegiate Dictionary 725 (1985) (“*Webster’s*”). This meaning is further supported by the terms cited in the EPCRA definition of “manufacture.” *See* 42 U.S.C. § 11023(b)(1)(C)(i). The common

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<sup>1</sup> EPA has interpreted the statutory term “otherwise use” in other contexts as not applying to chemicals that are extracted from the earth at the facility and are managed on-site. *See, e.g.*, 62 Fed. Reg. 23,834, 23,846 (May 1, 1997). As a result, extracting selenium from phosphate rock formations and subjecting the selenium to flotation processes would not constitute the “otherwise use” of the selenium.

definition of “to produce” is “to give being, form, or shape to” and “to make, esp[ecially to] manufacture.” *Webster’s*, at 938. The common definition of “to prepare” is “to put together: compound.” *Id.* at 929. In turn, the common definition of “to compound” is “to form by combining parts.” *Id.* at 270. When read together, the definitions plainly support the common definition of “manufacture” as meaning “to make” or “to create.”

These definitions also are consistent with EPA’s long-standing interpretation that “manufacture” means “to create.” In 1997, EPA promulgated a rule expanding the TRI program to activities in the metal mining industry. EPA concluded that “manufacture” under EPCRA means “to produce” or “to create”: “‘Manufacture’ of a specific listed toxic chemical includes its production. EPA interprets ‘production’ to include creation.” 62 Fed. Reg. at 23,849, 23,857. EPA again confirmed this conclusion and further described how the jurisdictional language should be interpreted in a brief the Agency submitted in *National Mining Association v. Browner*: “EPA’s interpretation considers a facility to ‘manufacture’ a toxic chemical if the facility creates, compounds, or imports the toxic chemical.” Brief of Defendants in Opposition to Plaintiffs’ Request for Relief, at 29 (July 10, 1998) (emphasis added). Accordingly, naturally occurring listed chemicals present at mining facilities have not been “manufactured” under the plain language of EPCRA.

## **B. Federal Courts Hold that Mining Facilities Need Not Report the Release of Naturally Occurring Chemicals Under EPCRA**

The plain language interpretation of “manufacture” to mean “to create” is further supported by two federal district courts that recently have interpreted the scope of EPCRA as applied to operations conducted at mining facilities. *See Barrick Goldstrike Mines, Inc. v. Whitman*, 260 F. Supp. 2d 28 (D.D.C. 2003) (“*Barrick*”); *National Mining Association v. Browner*, 2001 U.S. Dist. LEXIS 915 (D. Colo. 2001). These decisions make clear that EPCRA does not require mining facilities to report naturally occurring listed TRI chemicals, such as selenium that are present at the facility in their original state.

### **1. The Browner Decision**

In *National Mining Association v. Browner*, several mining companies and trade organizations challenged a rule promulgated by EPA that subjected certain coal and metal mining operations to the TRI reporting requirements of EPCRA. 2001 U.S. Dist. LEXIS at \*3. In promulgating the rule, the Agency interpreted the statutory term “processing” to include the extraction and beneficiation of ores containing naturally occurring listed chemicals (i.e., chemicals that were present in the ores prior to extraction from the earth). *Id.* at \*16-\*17.

The U.S. District Court for the District of Colorado set aside EPA’s interpretation of “processing” because the naturally occurring chemicals in undisturbed ores had not been “manufactured” and, consequently, could not have been “processed” within the meaning of EPCRA. *Id.* at \*20-\*21; *see also Barrick*, 260 F. Supp. 2d at 42-43 (noting that *Browner* “ruled that ‘naturally occurring undisturbed ores are not manufactured’ within . . . the meaning of EPCRA.”) (citing March 30, 2001 Order of Clarification in *Browner* (clarifying Jan. 16, 2001 Order and Memorandum of Decision)). In so concluding, the *Browner* court adopted the “commonly understood meaning” of “manufacture,” which was “(1) something made from raw

materials by hand or by machinery . . . ; (2) the process or operation of making wares or other materials by hand or by machinery especially where carried on systematically with division of labor; and (3) the act or process of making, inventing, devising, or fashioning . . . .” *Browner*, 2001 U.S. Dist. LEXIS at \*19 (quotation marks omitted) (citing Webster’s Third New International Dictionary 1378 (1986)). The court expressly rejected EPA’s argument that the term “manufacture” encompassed creation through natural processes as “contrary to the plain language of the Right-to-Know Act section 313.” *Id.* at \*20. As a result, EPA was precluded from applying the threshold activities of “manufacture” and “process” to the naturally occurring chemicals for TRI reporting under EPCRA.

Subsequently, EPA embraced the *Browner* decision and abandoned its argument that listed chemicals occurring naturally in the environment were “manufactured” by natural creative processes. That decision more accurately reflects the objective of the TRI program, which is to protect public health, safety, and the environment from chemical hazards created through industrial manufacturing processes. In the 1997 preamble to the rulemaking that subjected metal mines to TRI reporting obligations, EPA interpreted the definition of “manufacture” to include “production” - or “creation” - of a chemical by human process and by natural process. 62 Fed. Reg. at 23,857. The *Browner* court concluded, however, that “the term ‘manufacture’ connotes human involvement in the creation of a thing.” 2001 U.S. Dist. LEXIS 915, at \*20 (emphasis added). Consequently, the court set aside EPA’s interpretation because “naturally occurring undisturbed ores are not ‘manufactured’ within the meaning of [EPCRA Section 313]” and because, by definition, a chemical must be “manufactured” before it can be “processed.” March 30, 2001 Order of Clarification in *Browner*, at 3 (clarifying Jan. 16, 2001 Order and Memorandum of Decision).

The *Browner* decision also is consistent with prior Agency statements and analyses. Although the court set aside EPA’s inclusion of natural creation in the definition of “manufacture,” the court confirmed EPA’s analysis that “manufacture” of a chemical means “creation” of that chemical. In the 1997 preamble, EPA stated: “‘Manufacture’ of a specific listed toxic chemical includes its production. EPA interprets ‘production’ to include creation.” 62 Fed. Reg. at 23,857. In addition, in a 1988 rulemaking dealing with Section 313 reporting obligations, EPA interpreted the definition of “manufacture” to mean the human-caused coincidental production of listed chemicals:

EPA proposed to interpret “manufacture” to include coincidental production of a listed toxic chemical as a byproduct or impurity during the manufacture, processing, use, or disposal of any other chemical substance or mixture. . . . The proposed rule’s approach was intended to cover those situations in which a listed toxic chemical is created (intentionally or unintentionally) . . . .

EPA believes that the definition of manufacture in section 313 includes the coincidental production of toxic chemicals.

53 Fed. Reg. 4,500, 4,504 (Feb. 16, 1988).

Significantly, requiring human creation in the “manufacture” of a chemical also is in greater harmony with the statutory language. To include all natural creative processes in the



interpretation of “manufacture” makes superfluous the phrase “after its manufacture” in the statutory definition of “processing.” See 42 U.S.C. § 1023(b)(1)(C)(ii). Such an interpretation violates the rules of statutory construction. See *Browner*, 2001 U.S. Dist. LEXIS 915, at \*20 (holding EPA’s interpretation of the term “manufacture” to include natural creation to be impermissible under the rules of statutory construction); see also *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .”) (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46.06, pp. 181-86 (rev. 6th ed. 2000) (footnotes omitted)).

## 2. The Barrick Decision

The decision in *Barrick Goldstrike Mines, Inc. v. Whitman* further reinforced the principle from *Browner* that naturally occurring chemicals present at mining facilities have not undergone any threshold activity for purposes of TRI reporting under EPCRA. 260 F. Supp. 2d 28 (D.D.C. 2003). In *Barrick*, a mining company challenged EPA’s interpretation of “processing” as applied to natural impurities in the company’s gold mining products. *Id.* at 40. Originally, EPA asserted that naturally occurring listed chemical impurities present in dore<sup>2</sup> had been “processed” and, as a result, were subject to TRI reporting under EPCRA. *Id.* at 41. The U.S. District Court for the District of Columbia noted that EPA’s argument was founded, as the Agency had argued in *Browner*, on the proposition that listed chemicals created naturally in the environment had been “manufactured” and could therefore be “processed.” *Id.* at 41-42.

The *Browner* decision, however, was issued after the initial filing of briefs in *Barrick*, and the Agency thereafter abandoned its argument to the *Barrick* court that “manufacturing” could occur through natural creative processes. *Id.* EPA also acknowledged to the *Barrick* court that the “manufacture” of a chemical connoted the “creation” of that chemical. *Id.* at 42. With the removal of EPA’s “natural creation” interpretation of “manufacture” by the *Browner* decision, and consistent with EPA’s 1997 rulemaking and statements to the *Barrick* court, “human creation” of a chemical is an essential element in the definition of “manufacture.” As a result, the *Barrick* court concluded that there existed “no alternative legal theory by which the Court can find that the naturally-occurring impurities in the dore have been ‘manufactured’ within the meaning of EPCRA.”<sup>3</sup> *Id.* The court further concluded that because the naturally occurring impurities in the dore had not been “manufactured,” they could not have been “processed.” *Id.* at 42-43. Consequently, although the naturally occurring listed chemicals present in dore had been extracted from the ore and had undergone beneficiation, the court held that the listed chemicals

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<sup>2</sup> The dore at issue in *Barrick* is a mining product consisting predominantly of gold and silver that is poured into metal bars and distributed in commerce. 260 F. Supp. 2d at 32. The dore has been subjected to the extraction and beneficiation processes.

<sup>3</sup> Specifically, the *Barrick* court indicated that naturally occurring chemical impurities in the mined ore could feasibly have been “manufactured” during the extraction or beneficiation stages based on the inclusion of the term “prepare” in the statutory definition of “manufacture.” 260 F. Supp. 2d at 42; see also 42 U.S.C. § 11023(b)(1)(C)(i) (“The term ‘manufacture’ means to produce, prepare, import, or compound a toxic chemical.”). EPA, however, “foreclosed th[at] interpretation of the statute” by maintaining that the term “prepare” in the definition of “manufacture” means “to create.” *Id.* Consequently, the court found “no basis for concluding that [the mining company] has created and therefore ‘manufactured’ the impurities contained in the ore.” *Id.*

had not been subjected to any statutory threshold activity that would trigger TRI reporting obligations. *Id.* Thus, consistent with *Browner* and *Barrick*, naturally occurring listed chemicals contained in undisturbed ores have not been “manufactured” within the meaning of EPCRA and, as a result, cannot be “processed” thereafter at mining facilities.

**C.     The Presence of Selenium at Phosphate Mining Facilities  
       Would Not Trigger Reporting Obligations Under EPCRA**

As discussed above, in enacting EPCRA, Congress did not seek to regulate all TRI chemicals that are created by natural processes in the earth, but rather only those listed chemicals that certain facilities “manufacture,” “process,” or “otherwise use.” The Coalition recognizes that the selenium at issue at phosphate mining facilities is naturally occurring selenium, not selenium that is created, or “manufactured,” by the facilities. *See Coalition Petition*, at 1 (“Within these phosphate rock bearing formations (Phosphoria), Se occurs naturally...”). As a result, based on the *Browner* and *Barrick* decisions, the presence of naturally occurring selenium at phosphate mining facilities would not implicate reporting obligations under the TRI program.

**II.     Even Assuming the “Manufacture,” “Processing,” or “Otherwise Use”  
       of a TRI Listed Chemical at Phosphate Rock Mining Facilities, the  
       De Minimis Exemption Would Preclude Reporting**

In its Petition, the Coalition asserts that naturally occurring selenium at phosphate rock mining facilities “is transformed into the soluble forms of selenite and selenate when exposed to weathering and oxidation as in open pit mining processes.” *Coalition Petition*, at 1. Assuming *arguendo* that selenite and selenate are subsumed by the TRI chemical listing “selenium compounds,” naturally occurring selenium transformed into selenite and selenate when exposed to nature would not lead to the reporting of selenium because the selenite/selenate exists as a mixture with other chemicals in the ore and, as such, would be eligible for the *de minimis* exemption.<sup>4</sup> 40 C.F.R. §§ 372.65(c), 372.38(a). According to the TRI regulations:

If a toxic chemical is present in a mixture of chemicals at a covered facility and the toxic chemical is in a concentration in the mixture which is below 1 percent of the mixture, or 0.1 percent of the mixture in the case of a toxic chemical which is a carcinogen as defined in 29 CFR 1910.1200(d)(4), a person is not required to consider the quantity of toxic chemical present in such mixture when determining whether an applicable [reporting] threshold has been met under § 372.25 or determining the amount of release to report under § 372.30.

40 C.F.R. § 372.38(a).

Selenium is not considered a carcinogen as defined in 29 C.F.R. § 1910.1200(d)(4); thus, one percent is the relevant threshold. In its Petition, the Coalition asserts that “hot spots” exist where the selenium concentration is 200 mg/kg. *Coalition Petition*, at 4. According to TFI’s members, data collected at the North Maybe and South Maybe Canyon mines indicate that the selenium

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<sup>4</sup> This assumes that EPA grants the Coalition’s Petition and subjects phosphate rock mining to the “metal compounds category” set forth at 40 C.F.R. § 372.25(h).

concentration in the center waste shale (the material with the largest selenium concentration) does not exceed 200 mg/kg as the Coalition asserts. Rather, the largest reported concentration at either mine is 126 mg/kg.

Without opining as to the accuracy of the Coalition's assertion, even assuming it is true, this concentration (200 ppm) is well less than the 10,000 ppm *de minimis* non-carcinogenic threshold and the 1,000 ppm carcinogenic threshold. As such, the quantity of selenium compounds at a site would not be considered for purposes of determining whether the manufacture, processing, or otherwise use reporting threshold is exceeded.

### **Conclusion**

For the reasons stated above, TFI opposes the Coalition's petition and respectfully requests that EPA deny the request to add Phosphate Rock Mining to the list of facilities required to report releases of chemicals listed on the TRI. Should the Agency have any questions with respect to this matter, please feel free to contact me at (202) 515-2706.

Sincerely,

A handwritten signature in dark ink, appearing to read "W. Herz", written in a cursive style.

William C. Herz  
Vice President, Scientific Programs